(1)

91-1856

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

TRIPLE M DRILLING COMPANY,
AND GARY MORRISON,
Petitioners,

v.

KATHRYN SEIDER, TOMMY HUDGINS,
PATRICK MORRISSEY, AND
THE FEDERAL DEPOSIT INSURANCE
CORPORATION, AS RECEIVER FOR
MBANK HOUSTON, NATIONAL
ASSOCIATION
Respondents.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

IN A CASE OF LENDER LIABILITY, DOES A WRITTEN SUBORDINATION AGREEMENT, NEGOTIATED TO EXTEND THE DUE DATE OF AN EXISTING CREDIT AGREEMENT AND INTEGRATED WITH THE CREDIT AGREEMENT, BAR THE FDIC'S "SUPER DEFENSES" UNDER *D'OENCH, DUHME V. FDIC*, 315 U.S. 447 (1942)?

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IN THE SUPREME COURT OF THE UNITED STATES
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KATHRYN SEIDER, TOMMY HUDGINS,
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****

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

****

PETITION FOR WRIT OF CERTIORARI

The Petitioners TRIPLE M DRILLING COMPANY[1] and GARY MORRISON respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on February 18, 1992.

---

[1]There are no parent or subsidiary companies involved.

OPINIONS BELOW

United States District Judge Lynn N. Hughes entered a final judgment (FED. R. CIV. P. 58) against Triple M. Drilling Company ("Triple M") and Gary Morrison ("Morrison") based on the bank officers' (the Respondents will be collectively referred to in this manner) motion for summary judgment (FED. R. CIV. P. 56) on April 30, 1991. The court's opinion was delivered from the bench, and the transcript is reproduced as Tab 6 in the Record Excerpts below. The final judgment is reproduced here as Appendix B.

On February 18, 1992, in an unpublished opinion, a panel of the United States Court of Appeals for the Fifth Circuit affirmed Judge Hughes. The opinion is reproduced as Appendix "A".[2]

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its Judgment affirming the District Court on February 18, 1992. There was no petition for rehearing.

This Court has jurisdiction to review that Judgment pursuant to 28 U.S.C.A. § 1254(1) (1966).

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[2]A Petition for Writ of Certiorari in a related Fifth Circuit case, No. 91-1303 styled *Triple M Drilling Co. v. FDIC*, was filed prior to the decision below in the instant petition. At the time of filing of the instant petition, this Court has not acted in cause No. 91-1303. Consolidation in accordance with Sup. Ct. R. 27.3 may be appropriate.

STATEMENT OF THE CASE

This case does not present a fact-bound issue. The District Court decided, as a matter of law, that "[e]xtend credit does not mean extend due date, not in English and not at law" (Tab 6 to the Record Excerpts below, p. 4). That holding is contrary to law and results from a misapplication of the rule of *D'Oench, Duhme v. FDIC*, 315 U.S. 447 (1942) and is the central issue in the case.

Triple M Drilling Company was a Houston, Texas oil and gas drilling contractor. Gary Morrison was a founder, officer, and director of Triple M. In the oil patch, he was the identity of the company.

At the urging of its banker, Triple M started a revolving line of credit with MBank Houston to finance receivables from the operators for whom it was drilling wells. The line was secured by operating revenue and shareholder equity. It was raised several times, eventually to $750,000. A commercial revolving credit note in that amount was executed. It was to mature and come due on March 3, 1987.

Shortly after beginning operations in 1985, Triple M bought two drilling rigs from United States Steel's Oilwell Division ("Oilwell"). Oilwell financed the purchase, with Triple M giving a lien on receivables from the rigs as security.

At the zenith of its operations, Triple M had five land rigs working and was planning the acquisition of four more land and one offshore rig. They were drilling for large operators like Chevron, Sohio, and Amoco and for small independents with unfinancable names -- wildcatters -- as well.

The oil business, from exploration and production through delivery and sale of refined products, is fraught with risks. For the driller, a major one is geology. When drilling a turnkey well -- that is, one at a fixed price -- if a section of pipe breaks and the drill head has to be fished out; if the mud needed to equalize drilling pressure is inadequate and there is a blowout; or if impenetrable rock appears where the studies and reports said there was shale, the drilling contractor could be spiraling into a financial abyss. Another risk for the driller is the continuing ability of an operator to pay for the well.

In the early winter of 1986, one of Triple M's operators reported that it was not timely able to pay in full for a completed well. This situation occasioned a plan to restructure Triple M's debt service for 1987. Part of the plan was an equity infusion from shareholders. In December 1986, they contributed $400,000 cash, pledging an additional $600,000, and negotiations with MBank began.

Ultimately, MBank agreed that if Oilwell would subordinate the lien it had on Triple M receivables it would extend the $750,000 note through December 31, 1987. A written Subordination Agreement dated March 25, 1987 reflecting this purpose, but without the date, was approved by MBank's loan committee, executed by all parties, and has been continuously since the date of its execution, an official MBank record.

In May 1987 a Triple M turnkey drilling job in Louisiana got stuck before reaching the contract depth. Morrison renegotiated the contract price with the operator so Triple M would be paid for additional work, but when he reported the situation to MBank, the bank acted precipitately. The next day, a Friday pay day, with no request and no notice, acting in concert and without cause or authority, the

bank officers for the first time treated the note as overdue and offset Triple M's operating account--over $330,000--to pay on it. Rig hands and suppliers went unpaid, the bank officers notified all of Triple M's operators to make future Triple M payments directly to the bank and they put the word out in the oil patch--Triple M's checks were hot checks. Triple M, which had survived $8.00 a barrel oil, was killed by this unauthorized conduct; Gary Morrison was through in the oil business. A Chapter 11 bankruptcy petition was filed the Monday following the offset.

How The Federal Question Was Presented

With the authorization of the bankruptcy court Triple M, and Morrison, filed suit for non-federal contract and tort claims in the Texas state courts. The case was fully discovered and prepared for trial, which was set for January 28, 1991. In November, 1989, however, MBank failed and the FDIC became its Receiver.

The bank officers filed a third-party claim of indemnity against the FDIC as receiver for MBank. The FDIC acted only in its capacity as receiver, not in its corporate one, and to the provisions of 80 Stat. 1055 (1966), 12 U.S.C.A. § 1819 "Fourth" (1989) and 28 U.S.C.A. § 1446 (1973 and Supp. 1991), the suit was removed to the United States District Court for the Southern District of Texas.

REASONS FOR GRANTING THE WRIT

This case presents important issues requiring uniform federal application of the FDIC's "super defenses" in cases of lender liability of failed banks where the borrower is

wholly innocent. It requires no citation to authority to say that the crisis in the banking and savings and loan industry has generated an avalanche of litigation, and it is likely that the "super defenses" issue is involved in virtually every takeover of a federally-insured institution. Shepard's Citator currently has twenty-one columns of federal citations to either the case or the statute defining these "super defenses," yet this Court has substantively addressed them but once since their establishment, while the Circuits have expanded their reach far beyond this Court's holding. This Court should establish a uniform rule for the federal courts where a borrower is wholly innocent and is making claims or defenses based on a written agreement.

I.

THE DECISION OF THE FIFTH CIRCUIT IS IN CONFLICT WITH A DECISION OF THIS COURT

Other than to cite it for its holding on the uniform application of federal law, this Court has only discussed the decision in *D'Oench, Duhme v. FDIC*, 315 U.S. 447 (1942) on two occasions.

In *United States v. Yazell*, 382 U.S. 341 (1966), the Court described *D'Oench* as holding, "... that FDIC was entitled to a federal rule protecting it against misrepresentations as to the financial condition of the banks it insures, accomplished by secret arrangements inconsistent with the policy of the applicable federal statutes." *Id.* at 354.

Langley v. FDIC, 484 U.S. 86 (1987), found both the *D'Oench, Duhme* doctrine and 64 Stat. 889 [as amended 12 U.S.C.A. § 1823(e)] tied in their applicability to the rule of secret or side agreements, schemes or arrangements likely to mislead banking authorities. *Id.* at 91-92, 92-93.

The note in this case was foreclosed on almost two years before MBank's failure and the FDIC's receivership. There being no suggestion in the record that Triple M or the individuals lent themselves to any scheme or artifice to deceive or mislead bank examiners, and since the Subordination Agreement reflecting the extension of credit complies with all the requirements of 64 Stat. 889 [as amended 12 U.S.C.A. § 1823(e)] should the statute apply, the decision below is in conflict with decisions of this Court.

II.

THE FIFTH CIRCUIT'S APPLICATION OF THE *D'OENCH, DUHME* DOCTRINE, WHERE LENDER LIABILITY WAS BASED ON A WRITTEN INSTRUMENT REQUIRING INTERPRETATION, IS IN CONFLICT WITH TEXAS COMMON LAW OF CONTRACT INTERPRETATION

Triple M's renegotiation of its line of credit at Mbank began in December 1986. All of the parties -- Triple M, Oilwell, and MBank -- were fully aware of what was being negotiated and why. Triple M needed to extend its line of credit from March 3, 1987 to December 31, 1987 to stay in business. Oilwell and MBank wanted Triple M to stay in business, but MBank wanted a more secure position before it would extend Triple M's line of credit. Significantly, the parties' negotiations extended past the line of credit note's

due date without demand or notice.[3]

On the 31st of March, the Subordination Agreement, drafted by MBank, containing the following language, was fully executed.

> NOW, THEREFORE, to induce Bank to extend or continue to extend credit to the Debtor from time to time, and/or make or continue to make loans, advances, payments, or other financial accommodations with and to the Debtor, and in consideration of the premises, the mutual covenants contained herein and the extensions of credit, loans, advances, payments or other financial accommodations made or to be made or continued by MBank to the Debtor, the Debtor and Creditor hereby agree with Bank as follows . . . (R. 456).

The document as a whole can be read to see that Oilwell gave valuable consideration to MBank in return for the bank extending Triple M's $750,000 revolving line of credit note through the end of the year. The reader to make that judgment should have been a jury, however, not the judge.

Since there is no federal rule of contract interpretation in a context such as this [*Vernon v. Resolution Trust Corp.*, 907 F.2d 1101, 1109 (11th Cir. 1990) (deciding the meaning

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[3]The note required notice of acceleration and demand, in writing, by U. S. mail, in the event Triple M did not pay the note when due. [Tab 8, Record Excerpts below] No demand or notice was made at any time.

of an "acquisition agreement' with the FSLIC)[4]], Texas law must be applied. The Texas rules of contract interpretation require the denial of summary judgment.

If a written instrument is reasonably susceptible to more than one meaning, in Texas extraneous evidence is admissible to determine the true meaning of the instrument and summary judgment is improper. *R&P Enterprises v. LaGuarta, Gavrel, & Kirk*, 596 S.W.2d 517, 519 (Tex. 1980); *see also, City of Pinehurst v. Spooner-Addition Water Co.*, 432 S.W.2d 515, 519 (Tex. 1968).

Significantly, from March 3, 1987 through May 15, 1987 (the day of the offset of Triple M's operating account), both MBank and Triple M treated the revolving credit note as extended and not yet due. In light of the, at worst, ambiguous language of the Agreement, MBank's conduct is a vivid indication of intent and creates an issue not appropriate for summary judgment. *Mapco v. Pioneer*, 615 F.2d 297, 301 (5th Cir. 1980); *Portsmouth Baseball Club v. Frick*, 278 F.2d 395, 400-401 (2d Cir. 1960), *cert. denied*, 364 U.S. 831.

The effect and interpretation of the Subordination Agreement are questions for the jury after it hears the evidence necessary to consider the same in the light of the circumstances surrounding the Agreement's execution. *City of Pinehurst*, 432 S.W.2d at 519.

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[4]*Accord: Fidelity Savings and Loan v. de la Cuesta*, 458 U.S. 141, 174 (1982); *Kaiser Steel Corp. v. Mullins*, 455 U.S.72, 77 (1982).

CONCLUSION

Because the decisions below are in conflict with decisions of this Court and are contrary to the applicable Texas rule of contract interpretation, this Petition for a Writ of Certiorari should be granted. In the alternative, because of the improper grant of summary judgment, the case should be summarily reversed and remanded.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-2523
Summary Calendar

TRIPLE M DRILLING COMPANY
& GARY MORRISON,

Plaintiffs-Appellants,

versus

KATHRYN SEIDER, ET AL.,

Defendants-Appellees.

and Third Party Plaintiffs,

THE FEDERAL DEPOSIT INSURANCE
CORPORATION AS RECEIVER FOR MBANK
HOUSTON,

Third Party Defendants-Appellees.

Appeal from the United States District Court
For the Southern District of Texas
(CA-H-90-3823)

(February 18, 1992)

Before POLITZ, Chief Judge, SMITH, and EMILIO M. GARZA, Circuit Judges.

POLITZ, Chief Judge:*

Alleging procedural and substantive errors, Triple M. Drilling Company and Gary Morrison appeal an adverse summary judgment. Finding no error, we affirm.

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Background

Morrison is Chairman of the Board of Directors of Triple M which obtained a line of credit from MBank Houston, N.A., and executed a $750,000 revolving note with a maturity date of March 3, 1987. Triple M secured the note with its accounts receivable and granted MBank the right to set off any deposit accounts against the debt and to notify Triple M's debtors in the event of default. When the note was not paid as required, MBank set off Triple M's accounts. The instant litigation is based on Triple M's interpretation of a subordination agreement executed after the note became overdue and before the setoff. In this agreement another creditor of Triple M subordinated its security interest in Triple M's accounts receivable to MBank's security interest in those receivables. Conceding in their pleadings that MBank refused to sign an extension of the revolving note, Triple M and Morrison nonetheless claim that the subordination agreement effected such an extension. The subordination agreement contains the following language in a preamble to a list of terms:

> NOW, THEREFORE, to induce [MBank] to extend or continue to extend credit to [Triple M] from time to time, and/or make or continue to make loans, advances, payments or other financial accommodations with and to [Triple M], and in consideration of the premises, the mutual covenants contained herein and the extensions of credit, loans, advances, payments or other financial accommodations made or to be made or continued by [MBank] to [Triple M] and [the

> subordinating creditor] hereby agree with [MBank] as follows:

Multiple terms follow. In addition to securing MBank's superior rights in the accounts receivable, the terms provide that MBank may "without impairing or releasing any of [MBank's] rights, ... change the amount, manner, place or terms of payment of, or change or extend the time of payment of, or renew or alter the Bank Note in any and all respects. ..."

Triple M filed suit against MBank; MBank subsequently became insolvent. In the suit against MBank the district court held that MBank's breach of contract, breach of good faith and fair dealing, and fraud claims, as asserted against the FDIC as Receiver of MBank, were foreclosed by the doctrine of *D'Oench Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) and 12 U.S.C. §1823(e). We affirmed. *See Triple M Drilling Co. v. MBank Houston, N.A.*, No. H-89-1511 (S.D. Tex. Aug. 9, 1990), *aff'd*, No. 90-2999 (5th Cir. Nov. 19, 1991); *see also, Clay v. FDIC*, 934 F.2d 69 (5th Cir. 1991) (an inference of a secret agreement in bank documents will not withstand *D'Oench Duhme*). Triple M filed the instant action for breach of contract, breach of good faith and fair dealing, fraud, and tortious interference against the appellees, former officers of MBank. The appellees in the principal action in turn filed third-party complaints against the FDIC as Receiver for MBank. The district court granted summary judgment for the bank officers and the FDIC. Triple M and Morrison appeal.

Analysis

Summary judgment is appropriate if the record discloses "that there is no genuine issue as to any material

fact and the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). We review the district court's grant of summary judgment *de novo*.

Morrison does not have standing to sue for the actionable wrongs committed against Triple M. *Renfro v. FDIC*, 773 F.2d 657 (5th Cir. 1985); *Wingate v. Hajdik*, 795 S.W.2d 717 (Tex. 1990). Triple M's claims for breach of contract, breach of good faith and fair dealing,[1] and fraud are barred by claim preclusion. *See Lubrizol Corp. v. Exxon Corp.*, 871 F.2d 1279 (5th Cir. 1989). Claim preclusion bars the parties to a prior proceeding, or those in privity with them, from relitigating the same claims that were subject to a final judgment on the merits by a court of competent jurisdiction. *Lubrizol*. In the first suit against MBank, we affirmed the grant of summary judgment on identical breach of contract, breach of good faith and fair dealing, and fraud claims. *Triple M Drilling Co. v. MBank Houston, N.A.*, No. H-89-1511 (S.D.Tex. Aug. 9, 1990), *aff'd*, No. 90-2999 (5th Cir. Nov. 19, 1991).[2] The only difference between the

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[1]Regarding Triple M's claim for breach of good faith and fair dealing, we note that in any event, "'[u]nder Texas law there is no general fiduciary obligation between a lender and a borrower or between business parties.'" *Clay v. FDIC*, 934 F.2d 69, 72 (5th Cir. 1991) (quoting *In re Letterman Bros. Energy Secs. Litig.*, 799 F.2d 967, 975 (5th Cir. 1986), *cert. denied*, 480 U.S. 918 (1987)); *FDIC v. Coleman*, 795 S.W.2d 706 (Tex. 1990).

[2]The district court in *Triple M Drilling Co. v. MBank Houston, N.A.* found that breach of contract and good faith, and fraud claims were barred by section 1823(e), but the court allowed a tortious interference claim that did "not depend upon the validity of the alleged agreements." *Triple M Drilling Co. v. MBank Houston, N.A.*, No. H-89-1151, Slip Op. at 3. *See Campbell Leasing, Inc. v. FDIC*, 901 F.2d 1244 (5th Cir. 1990). We do not address whether the tortious interference claim in the

final judgment in the prior suit and the instant litigation is that here Triple M has sued MBank's officers. Because Triple M's claims against the officers are for actions within the scope of their duties as MBank employees, identity of parties exists for purposes of claim preclusion. *Lubrizol Corp.*

In its tortious interference claim, Triple M argues that MBank interfered with Triple M's ability to conduct business by dishonoring checks and asking debtors to direct payments to MBank. The elements of a cause of action for tortious interference under Texas law are: (1) a contract, (2) an intentional act calculated to cause damage and interfering with the contract, (3) actual damages caused by the intentional act, and (4) the lack of any justifiable cause or excuse on the part of the defendant. *Haralson v. E.F. Hutton Group, Inc.*, 919 F.2d 1014 (5th Cir. 1990). Triple M argues that MBank lacked a justifiable cause to exercise its rights under the past due revolving note because the subordination agreement had extended the note. We conclude that as a matter of law this claim is not viable.

Triple M relies solely on the agreement's preamble language that it was designed "to induce [MBank] to extend or continue to extend credit to [Triple M]." We agree with the district court that the subordination agreement between MBank, Triple M, and the subordinating creditor is not an

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first suit is the same one asserted in the instant litigation because Triple M may not bind the bank officers to the first suit. The claim preclusion is non-mutual: The officers, who were not a party to the first suit, are not bound by it. *See generally* C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §§ 4463-64 (1981); *see also Lubrizol*, 871 F.2d at 1289 & n.15. We do not, in any event, address the application of section 1823, as we find summary judgment appropriate on the grounds articulated by the district court.

agreement to extend the revolving note, which was an existing parallel debt. The meaning of an unambiguous contract is a purely legal question that may be resolved by summary judgment. *South Central Bell Telephone Co. v. Canal Place Ltd. Partnership*, 927 F.2d 867 (5th Cir. 1991). Whether a contract term is ambiguous is a question of law reviewed *de novo*. *Forest Oil Corp. v. Strata Energy, Inc.*, 929 F.2d 1039 (5th Cir. 1991). A Texas court will deem a contract unambiguous when it is reasonably open to only one interpretation when one considers standard rules of interpretation and the surrounding circumstances. *Hanssen v. Qantas Airways Ltd.*, 904 F.2d 267 (5th Cir. 1990).

The subrogation agreement may not be given the interpretation advanced by Triple M. The preamble language emphasized by Triple M does not identify the note. None of the many terms provide for the note's extension. Further, the agreement does not set, or even reference, a new maturity date. Because the only function of an agreement to extend the note would be to set a new due date, the absence of this term would render the alleged agreement, if we took it to be such, indefinite and unenforceable under Texas law. *See Bank of El Paso v. T.O. Stanley Boot Co.*, 809 S.W.2d 279 (Tex.App. 1991); *University National Bank & Ernst & Whinney*, 773 S.W.2d 707 (Tex.App. 1989) (citing *Moore v. Dilworth*, 142 Tex. 538, 179 S.W.2d 940 (1944)) (an agreement must define the terms necessary for its enforcement). Triple M may not ask a jury to supply an essential contract term. *Id.* Even if we were to find an ambiguity and look beyond the four corners of the document to discern the meaning of the preamble phrase, it is still clear that MBank did not commit to an extension. Triple M stated in its pleadings that MBank expressly refused to sign an extension of the note.

Triple M complains that the district court had instructed it not to file a brief in opposition to the appellee's summary judgment motion. The record reflects that Triple M received notice of and attended a hearing on the summary judgment motion, and was allowed to submit written memoranda with a motion for rehearing. We perceive no error arising out of the matter complained of. Triple M has not identified any relevant evidence it was not permitted to introduce nor has it pointed to any error of law about which we are persuaded. Triple M has, therefore, not acquitted its burden of identifying a reversible error on appeal.

For the reasons assigned, the district court is AFFIRMED.

APPENDIX B

United States District Court Southern District Of Texas

TRIPLE M DRILLING COMPANY, *et al.*, Plaintiffs,	§	
	§	CIVIL ACTION H-90-3823
versus	§	
KATHRYN SEIDER, Defendant.	§	

FINAL JUDGMENT

Triple M Drilling Company and Gary Morrison take nothing from Kathryn Seider, Tommy Hudgins, and Patrick Morrissey.

Kathryn Seider, Tommy Hudgins, and Patrick Morrissey take nothing from MBank Houston.

SIGNED on April 30th, 1991, at Houston, Texas.

/S/ Lynn N. Hughes
UNITED STATES DISTRICT JUDGE

(2)

No. 91-1856

Supreme Court, U.S.
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Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

On April 29, 1991, the United States District Court for the Southern District of Texas heard oral argument on Respondents' Motion for Summary Judgment. The district court's opinion was delivered from the bench. A transcript of that opinion is reproduced at tab 6 in the

Record Excerpts below and is attached hereto as Appendix A.

The final Judgment was entered on May 2, 1991 (Pet. App. 9a).

On may 14, 1991, the United States District Court for the Southern District of Texas denied Petitioners' Motion for Rehearing. The Opinion on Denial of Rehearing is reproduced at tab 4 in the Record Excerpts below and is attached hereto as Appendix B.

On February 18, 1992, the United States Court of Appeals for the Fifth Circuit, in an unpublished opinion, affirmed the district court (Pet. App. 1a-8a).

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its Judgment on February 18, 1992. The Petition for Writ of Certiorari was filed on or about May 15, 1992. The jurisdiction of this Court is, therefore, invoked under 28 U.S.C. § 1254(1).

STATEMENT

In 1985, one of the Petitioners, Triple M Drilling Company ("Triple M"), obtained a revolving credit line ("Note") from MBank Houston, N.A. ("MBank"), where

Triple M maintained various operating accounts.[1] Pursuant to a security agreement, Triple M pledged certain accounts receivable to secure the Note and agreed that any Triple M deposit account at MBank could be set off against Triple M's indebtedness. Later, Triple M purchased drilling equipment from USX Corporation's Oilwell Division ("Oilwell"), financing these purchases in part by granting Oilwell a lien on Triple M's accounts receivable.

On March 3, 1987, the Note matured by its own terms. On March 25, 1987, Triple M, Oilwell and MBank executed a Subordination Agreement under which Oilwell's security interest in Triple M's accounts receivable was subordinated to MBank's security interest in those receivables (the "Subordination Agreement"). The Subordination Agreement's preamble reflects that it was designed "to induce [MBank] to extend or continue to extend credit [to Triple M] from time to time, and/or make or continue to make loans, advances, payments or other financial accommodations." Nothing in the Subordination Agreement provides for an extension of the Note or a new maturity date (Pet. App. 7a). To the contrary, the Subordination Agreement expressly reserves to MBank all of its rights against Triple M (Pet. App. 4a; C.A. Record Excerpts Tab 9, R. 78).

Subsequently, on May 15, 1987, nearly ten weeks after the Note matured, MBank exercised its right under the Note and security agreement to offset the Triple M

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[1] The other petitioner is Gary Morrison ("Morrison"), an officer and director of Triple M. Triple M and Morrison will be collectively referred to as the "Petitioners".

deposit account against Triple M's indebtedness evidenced by the Note. In addition, MBank notified Triple M's debtors to make payments directly to MBank, a right expressly reserved under the terms of the Note and security agreement (Pet. 4-5; Respondents App. 2a, 12a-13a).

In July 1987, Triple M commenced litigation against MBank in Texas State court, alleging that MBank had orally agreed to extend the Note (the "MBank Lawsuit") (C.A. Record Excerpts R. 402, 405, 406). In March 1989, MBank became insolvent, and the Federal Deposit Insurance Corporation ("FDIC") was appointed its receiver. The FDIC as receiver removed the MBank Lawsuit to federal court and moved for summary judgment on the ground that Triple M's and Morrison's claims were barred under the doctrine of *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942), and under 12 U.S.C. § 1823(e) (Supp. I 1989). The FDIC was granted a final judgment in the MBank Lawsuit on December 14, 1990. On November 19, 1991, the Fifth Circuit affirmed the district court's judgment in the MBank Lawsuit (Pet. App. 4a). On May 18, 1992, this Court denied Triple M's Petition for Writ of Certiorari in the MBank Lawsuit.[2]

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[2] Petitioners suggest that it may be appropriate to consolidate this case with the MBank Lawsuit (Pet. 1 ftnote 2). Apparently Petitioners believe that this case involves issues relating to the *D'Oench, Duhme* doctrine and 12 U.S.C § 1823(e), as did the MBank Lawsuit. Although factually related to the MBank Lawsuit, this case does not involve these legal questions. As set forth in detail herein, unlike the MBank Lawsuit, this case was not decided on the legal issues involving the *D'Oench, Duhme* doctrine or 12 U.S.C. § 1823(e).

Shortly after removal of the MBank Lawsuit, Triple M and Gary Morrison were confronted with the defenses afforded the FDIC, as Receiver for MBank, under 12 U.S.C. § 1823(e) and the *D'Oench, Duhme* doctrine. Consequently, this lawsuit was filed against MBank's former officers, Tom Hudgins, Patrick Morrissey and Kathryn Seider (collectively "Respondents"). The claims asserted against Respondents were identical to the claims in the MBank Lawsuit (Pet. App. 5a-6a).

On November 1, 1990, Respondents filed a Third Party Claim against the FDIC, as Receiver for MBank. This case was removed to federal court by the FDIC on December 17, 1990. Respondents filed a Motion for Summary Judgment on all of Petitioners' claims. The Motion for Summary Judgment was based on four separate grounds:

(1) Petitioners' claims were barred by the *D'Oench, Duhme* doctrine;

(2) Petitioners' claims had no basis on the merits;

(3) Morrison, individually, did not have standing to assert any of the claims; and

(4) Petitioners' claims were barred by the doctrines of res judicata and/or collateral estoppel.

Realizing that any alleged oral agreement to extend the Note may be subject to *D'Oench, Duhme* and § 1823(e) defenses, Petitioners argued for the first time at the hearing on the Motion for Summary Judgment that the agreement to extend the Note was contained in the Subordination Agreement. Notwithstanding this argument, Respondents' Motion for Summary Judgment was granted. Significantly, the district court did not consider

the *D'Oench, Duhme* doctrine in granting Defendants' Motion for Summary Judgment. The district court emphatically stated "I don't want to even talk about old *D'Oench, Duhme*" (Respondents App. 3a). Consequently, *D'Oench, Duhme* was not an issue at the court of appeals. Furthermore, the only reference the court of appeals made to the *D'Oench, Duhme* doctrine was in connection with the MBank Lawsuit. (Pet. App. 4a). Moreover, the court of appeals' opinion expressly states that it was not addressing the application of 28 U.S.C. § 1823 (Pet. App. 6a). The court of appeals, therefore, affirmed the district court's summary judgment.

ARGUMENT

Petitioners' primary reason for contending that this Court should grant the Petition for Writ of Certiorari is because the FDIC'S "super defenses" under the *D'Oench, Dume* doctrine and 12 U.S.C. § 1823(e) should not apply in this case (Pet. i, 5-7). Apparently, Petitioners believe that the Fifth Circuit's decision conflicts with this Court's decision in *D'Oench, Duhme v. FDIC*, 315 U.S. 447 (1942) and subsequent decisions interpreting *D'Oench, Duhme*, e.g., *U.S. v. Yazell*, 382 U.S. 341 (1966) and *Langley v. FDIC*, 484 U.S. 86 (1987) (Pet. 6-7). This Court should not grant the Petition because neither *D'Oench, Duhme* nor § 1823(e) was the basis for the decisions in the district court or the Fifth Circuit. In fact, the district court expressly stated that it did not want to hear arguments regarding *D'Oench, Duhme* and the court of appeals expressly stated that it would not address the application of § 1823(e). The Supreme Court will review issues not raised or resolved

in the lower court only in exceptional cases. *Youkam v. Miller*, 425 U.S. 1399, 234-235 (1976). This case presents no such exceptional circumstances warranting the review of either the *D'Oench, Duhme* doctrine or 12 U.S.C. § 1823(e). If this Court were inclined to review issues relating to the *D'Oench, Duhme* doctrine or 12 U.S.C. § 1823(e), then that review should have been in the MBank Lawsuit, not this case.

Petitioners implicitly concede in their Petition that 12 U.S.C. § 1823(e) may not apply to this case (Pet. 7). Nevertheless, Petitioners, for the first time in their Petition and without any supporting evidence in the record, state quite matter-of-factly that the Subordination Agreement reflecting the extension of credit complies with all of the requirements of 12 U.S.C. § 1823(e) *id.* To the contrary, Respondents deny that any of the requirements of § 1823(e) have been satisfied.[3]

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[3] 12 U.S.C. § 1823(e) provides:

> No agreement which tends to diminish or defeat the interest of the [FDIC] in any asset acquired by it under this section or section 1821 of this Title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the [FDIC] unless such written agreement:
>
> (1) is in writing;
>
> (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution;

(Continued on following page)

Petitioners' secondary reason for contending that this Court should grant the Petition for Writ of Certiorari is a tortured attempt to claim that the Fifth Circuit decided a federal question in a way that conflicts with the Texas Supreme Court (Pet. 7-9). Petitioners contend that the mere recitals and the preamble of the Subordination Agreement constitute MBank's agreement to extend the maturity date of the Note to December 31, 1987. Apparently, Petitioners believe that this Court should grant the Petition for Writ of Certiorari because the district court refused to admit extrinsic evidence regarding the interpretation of the Subordination Agreement based on FDIC "super defenses," thus abrogating Texas law (Pet. 9). This argument is disingenuous. As previously stated, neither the district court nor the court of appeals decided this case based on the FDIC "super defenses." Furthermore, Texas contract interpretation law has not been abrogated. Under Texas law, extrinsic evidence of the parties' intent with respect to the meaning of a contract is allowed only if the contract is ambiguous. *Hettig & Co. v. Union Mutual Life Ins. Co.*, 781 F.2d 1141, 1143 (5th Cir. 1986). Determining whether a contract is ambiguous is a question of law. If the contract is not reasonably subject to more than one meaning then it is not ambiguous. *Hettig & Co. v. Union*

(Continued from previous page)

(3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee; and

(4) has been, continuously, from the time of its execution, an official record of the depository institution.

Mutual Life Ins. Co., 781 F.2d 1141, 1143 (5th Cir. 1986); *R&P Enterprise v. LaGuarta Gavrel & Kirk, Inc.*, 596 S.W.2d 517, 518 (Tex. 1980); *City of Pinehurst v. Spooner Addition Water Co.*, 432 S.W.2d 515, 518 (Tex. 1968); *Universal CIT Credit Corp. v. Daniel*, 243 S.W. 2d 154, 158 (Tex. 1951).

The district court and the court of appeals, reviewing this case de novo, determined that the Subordination Agreement was unambiguous and clearly did not contain terms extending the due date of the Note (Pet. App. 6a-7a; Respondents App. 4a-5a, 11a-12a). A significant factor in both courts' holdings was that the Subordination Agreement failed to contain the most crucial term – a new maturity date (Pet. App. 7a; Respondents App. 4a, 13a). Of further significance, was the fact that Petitioners conceded in their pleadings that they had requested an extension of the Note's maturity date and MBank expressly refused to sign an extension of the Note (Pet. App. 7a). Consequently, consistent with Texas law, the lower courts determined that the contract was unambiguous and not an agreement to extend the Note (Pet. App. 7a; Respondents App. 13a-15a).

CONCLUSION

The Petition for Writ of Certiorari should be denied because

1. Petitioners' erroneous premise that the lower courts' decisions were based upon the *D'Oench, Duhme* doctrine or 12 U.S.C. § 1823(e); and

2. consistent with Texas law, the Subordination Agreement was unambiguous and did not extend the due date of the Note.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

TRIPLE M DRILLING CO., ET AL	)	CA NO. H-90-3823
VS.	)	HOUSTON, TEXAS
KATHRYN SEIDER	)	APRIL 29, 1991 2:00 P.M.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE LYNN N. HUGHES

APPEARANCES:

FOR THE PLAINTIFF:	MR. DAN MCEVILY MS. CHERYL B. JETER ALEXANDER & MCEVILY FIVE POST OAK PARK 24TH FLOOR HOUSTON, TEXAS 77027
FOR THE DEFENDANT:	MR. WILLIAM VINCENT HANNIGAN MR. DONALD F. HAWBAKER WINSTEAD, SECHREST & MINICK 910 TRAVIS, STE. 1700 HOUSTON, TEXAS 77002
FOR THE RECEIVER:	MR. MICHAEL D. CONNER HIRSCH & WESTHEIMER 700 LOUISIANA 25TH FLOOR HOUSTON, TEXAS 77002
COURT REPORTER:	HERMAN CHESTER 515 RUSK, #7705 HOUSTON, TEXAS 77002 (713) 221-9580

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY, TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION.

[p. 2] THE COURT: THANK YOU, BE SEATED.

MR. MCEVILY.

MR. MCEVILY: GOOD AFTERNOON, YOUR HONOR.

THE COURT: ASSUMING EVERYTHING THAT TRIPLE M SAY THE INDIVIDUALS AT MCORP SAID OR DID OR DIDN'T DO IS TRUE, THERE SEEMS TO ME TO BE OBVIOUS FACTUAL OR LEGAL DEFECTS IN EACH OF THEIR CLAIMS. WE CAN START WITH THE ONE THAT IT SEEMS TO ME THAT RES JUDICATA SHOULD BAR THIS SUIT BECAUSE OF THE OTHER SUIT, SINCE THESE CLAIMS COULD HAVE BEEN BROUGHT IN THAT ACTION.

AND, OF COURSE, YES, THIS IS A PARALLEL CASE, BUT THERE'S NO FRAUD, BECAUSE THERE WAS NO MATERIAL MISREPRESENTATION OF THE PRESENT FACT ON WHICH THEY COULD REASONABLY RELY. NOTHING WAS DONE NEGLIGENTLY. WHATEVER THOSE BANKERS DID, THEY DID INTENTIONALLY. THEY DIDN'T TORTIOUSLY INTERFERE WITH ANYBODY, BECAUSE EVERYBODY THEY NOTIFIED THEY HAD A RIGHT TO NOTIFY. I'M ASSUMING AN ORAL PROMISE TO RENEW THE NOTE, BUT THAT'S NOT ENFORCEABLE. WHAT DID YOUR CLIENT GIVE FOR THE PROMISE?

MR. MCEVILY: WELL, YOUR HONOR, THAT IS WHAT MAKES THIS CASE DIFFERENT FROM THE

RUN OF THE MILL D'OENCH DHUME CASE THAT WE ARE SEEING.

THE COURT: DID YOU HEAR ME SAY D'OENCH DHUME?

I DON'T WANT TO EVEN TALK ABOUT OLD D'OENCH DHUME.

[p. 3] MR. MCEVILY: IN THIS CASE THERE WAS MORE THAN AN ORAL PROMISE TO RENEW THE NOTE OR EXTEND THE NOTE UNTIL THE END OF THE YEAR, THERE WAS A WRITTEN AGREEMENT TO DO THAT. SO THAT WHEN THE BANK OFFSET THE TRIPLE M ACCOUNT, THEY HAD NO RIGHT TO DO SO BECAUSE THE NOTE IN FACT WAS NOT OVER-DUE.

THE OTHER SUIT, OF COURSE, HAS NOT BEEN CONCLUDED, WE'RE AWAITING THE APPELLEE'S BRIEF TO BE FILED IN THAT CASE BEFORE IT'S ARGUED. AND THE POINT OF CONTENTION THERE, OF COURSE, IS SPECIFICALLY WHETHER OR NOT THERE IS A WRITTEN AGREEMENT TO EXTEND THE NOTE. IF SO, THEN –

THE COURT: WHERE DO YOU FIND A WRIT-TEN AGREEMENT TO EXTEND THE NOTE?

MR. MCEVILY: IT'S THE SUBORDINATION AGREEMENT, YOUR HONOR, BETWEEN THE BANK, TRIPLE M, AND USX OIL WELL, WHEREBY OIL WELL AND TRIPLE M GAVE UP SECURITY INTERESTS IN RECEIVABLES TO THE BANK TO GIVE THEM A SUPE-RIOR POSITION IN ORDER FOR THE BANK TO RENEW THIS NOTE, THE REVOLVING LINE OF

CREDIT NOTE UNTIL THE END OF THE CALENDAR YEAR. THAT SUBORDINATION AGREEMENT WAS SIGNED, IT WAS NOTARIZED, IT WAS RECORDED.

THE COURT: WHERE IN THE SUBORDINATION AGREEMENT DOES IT OBLIGE THE BANK TO EXTEND?

MR. MCEVILY: THE BANK AGREES THAT IN CONSIDERATION FOR RECEIVING A SUPERIOR LIEN POSITION, WHICH THEY DID NOT HAVE BEFORE, THEY AGREED TO EXTEND THE CREDIT OF TRIPLE M. OUR CONTENTION IS THE MEANING OF THAT EXTEND CREDIT IS TO EXTEND [p. 4] THE TERMS OF THE CREDIT UNTIL THE END OF THE CALENDAR YEAR, WHICH IS WHAT ALL THE PARTIES AGREED.

THE COURT: EXCEPT THAT'S NOT WHAT THE DOCUMENT SAYS. THE DOCUMENT SAYS EXTEND CREDIT. WHICH MEANS, AMONG OTHER THINGS, NOT CALLING A PAST DUE NOTE RIGHT THEN.

MR. MCEVILY: WE COULD HAVE – I DON'T CONCEDE THERE COULD BE A DISPUTE ON THAT, YOUR HONOR, HOWEVER, IT'S A FACTUAL DISPUTE THAT WE'RE ENTITLED TO HAVE A JURY ADDRESS.

THE COURT: EXTEND CREDIT DOES NOT MEAN EXTEND DUE DATE, NOT IN ENGLISH AND NOT AT LAW. AND I AM NOT GOING TO BOTHER ANYBODY BY PUTTING THEM IN THE JURY BOX TO ASK THEM DOES NIGHT MEAN DAY OR DAY NIGHT. EXTEND CREDIT MEANS EXTEND CREDIT, YOU KNOW THAT. I UNDERSTAND YOU ARE GETTING

PAID FOR THAT, BUT THAT IS A SILLY ARGUMENT THAT EXTEND CREDIT MEANS TO POSTPONE THE DUE DATE.

MR. MCEVILY: NEVERTHELESS, YOUR HONOR, THAT WAS THE SUBJECT OF THE NEGOTIATION AMONG THE THREE PARTIES. AND THE BANK –

THE COURT: THAT, I WILL TAKE THAT AS TRUE. I DON'T CARE WHETHER THE ERUPTION AT POMPEII WAS THE SUBJECT OF NEGOTIATION, WHAT I CARE ABOUT IS THE FACT THAT THERE IS NO WRITTEN AGREEMENT FOR AN EXTENTION OF THE DUE DATE OF THE NOTE. THE NOTE WAS PAST DUE WHEN IT WAS CALLED, IT WAS CALLED ACCORDING TO ITS TERMS, AND THERE IS NO WRONG THAT RESULTS FROM THAT. IT MAY HAVE CREATED A LARGE AMOUNT OF UNHAPPINESS, BUT [p. 5] IT IS NOT A TORT TO CALL A PAST DUE NOTE. IT'S NOT A TORT, LIKE FRAUD, NOT TO HONOR A GRATUITOUS REPRESENTATION THAT YOU WILL DO SOMETHING IN THE FUTURE, NOT EVEN UNDER THE LOOSEST OF TEXAS CAUSES OF ACTION IS THAT FRAUD. THERE'S NO FIDUCIARY DUTY, THERE'S NO CONTRACT, WE'VE GOT GOOD FAITH AND FAIR DEALING, THERE'S CERTAINLY NOTHING HERE THAT THERE WAS A CROSS RELATIONSHIP. DID YOUR CLIENT SIGN A NOTE FOR WHATEVER IT WAS, $7 MILLION OR $750,000?

MR. MCEVILY: REVOLVING LINE OF CREDIT.

THE COURT: AND TO THE EXTENT THAT THE BANK COLLECTED ANY MONIES FROM YOUR

DEBTORS, YOUR CLIENT'S DEBTORS, DID THEY CREDIT THAT AGAINST THE NOTE?

MR. MCEVILY: I BELIEVE THEY DID, YOUR HONOR.

THE COURT: AND DID THEY DISBURSE SOME MONEY UNDER THAT NOTE TO YOUR CLIENT?

MR. MCEVILY: WELL, THE NOTE WAS DRAWN DOWN TO THE EXTENT OF $700,000.

THE COURT: AND SO, IF YOU READ THE DOCUMENT ON ITS FACE, THEN, THE BANK FULLY PERFORMED. AND DID YOUR CLIENT PAY THAT MONEY BACK?

MR. MCEVILY: WELL, NO, YOUR HONOR, NOT ALL OF IT.

THE COURT: YOU SAY; WELL, NO AS IF THAT'S A QUESTION I SHOULDN'T HAVE ASKED ASKED. YOUR CLIENT WAS UNEQUIVOCALLY OBLIGED TO REPAY THE NOTE?

MR. MCEVILY: THAT'S CORRECT.

[p. 6] THE COURT: AND YOUR CLIENT DIDN'T?

MR. MCEVILY: THAT'S CORRECT.

THE COURT: AND YOUR CLIENT NOW WANTS THE BANK TO GIVE THEM, AND THE OFFICERS TO GIVE THEM A WHOLE LOT OF MONEY BECAUSE YOUR CLIENT DIDN'T MEET ITS OBLIGATION.

MR. MCEVILY: BECAUSE, ON THE CONTRARY, THE BANK DID NOT MEET ITS OBLIGATION.

THE COURT: NO, LET'S GO BACK; THE ORIGINAL DEAL THAT'S IN WRITING IS ABSOLUTE, THERE'S NO DISPUTE ABOUT THAT, IS THERE?

THERE'S NOTHING IN THE NOTE ABOUT ANYBODY BEING OBLIGED TO RENEW IT OR EXTEND IT OR ANYTHING?

MR. MCEVILY: NO. UNDER THE ORIGINAL TERMS OF THE NOTE, I BELIEVE THE DUE DATE WAS MARCH THE 3RD.

THE COURT: AND YOUR CLIENT DID NOT PAY THE NOTE ON MARCH 3RD.

MR. MCEVILY: BECAUSE, FOR THREE MONTHS OF NEGOTIATION WITH THE BANK – YOUR HONOR, IF I MIGHT BE HEARD.

THE COURT: NEGOTIATIONS, HAVE YOU EVER LET ANYBODY PAY A NOTE WITH NEGOTIATIONS?

MR. MCEVILY: WELL, YOUR HONOR –

THE COURT: THE ANSWER IS; NO, NEGOTIATIONS ARE NOT PAYMENT. MY QUESTION TO YOU WAS NOT WERE YOU BUSY WORKING ON ANOTHER DEAL THAT WOULD HAVE OBVIATED, MY QUESTION WAS DID YOUR CLIENT PAY THE NOTE; AND THE ANSWER IS NO.

[p. 7] MR. MCEVILY: BECAUSE THE NOTE NEVER BECAME DUE.

THE COURT: THE NOTE WAS NOT PAID BECAUSE YOUR CLIENTS WERE TRYING TO GET TO NEGOTIATE ANOTHER DEAL.

MR. MCEVILY: IT HAD BEEN DONE, YOUR HONOR.

THE COURT: NEGOTIATED.

MR. MCEVILY: PRIOR TO THE MARCH THE 3RD DATE.

THE COURT: AND, OF COURSE, THAT IS SHOWN BY A NEW NOTE THAT PAYS THIS ONE BY EXTENTION AND RENEWAL AND THIS ONE IS MARKED PAID BY EXTENTION AND RENEWAL.

MR. MCEVILY: AND THEREIN LIES THE BANK'S NEGLIGENCE, YOUR HONOR, THEY NEVER PROVIDED US THE NOTE THAT THEY AGREED TO DO.

THE COURT: WAIT A MINUTE. IF YOU NEVER GOT THE NOTE, THEN YOUR CLIENT NEVER SIGNED IT, RIGHT?

MR. MCEVILY: THAT'S CORRECT.

THE COURT: AND SO, SINCE YOUR CLIENT NEVER GAVE THEM ANOTHER NOTE, THEN THIS ONE IS STILL DUE, WHICH MEANS YOUR CLIENT OWES THE MONEY.

MR. MCEVILY: I CAN'T AGREE, YOUR HONOR, AND I WOULD REQUEST –

THE COURT: WAIT A MINUTE. IT WAS THE BANK THAT WAS SUPPOSED – THE BANK GIVES YOU

THE MONEY AND THEN THEY ARE SUPPOSED TO GIVE YOU THE PAPERWORK, TOO. AND IF THEY DIDN'T GIVE YOU THE PAPERWORK, LOAN THE MONEY, I THINK IS THEIR POSITION, THEY LOANED YOU THE MONEY AND THEY DIDN'T DELIVER YOU [p. 8] THE PAPERWORK, THAT OBVIATES YOUR CLIENT'S RESPONSIBILITY TO PAY THE NOTE.

MR. MCEVILY: WHEN THE NOTE DID NOT ARRIVE PRIOR TO MARCH 3RD WE CALLED THE BANK AND WERE CONSTANTLY ASSURED THAT IT WAS ON THE WAY. IN ADDITION TO WHICH, DURING THE PERIOD OF DECEMBER THROUGH MARCH, THE BANK WAS AWARE THAT WE HAD, I BELIEVE, IT WAS A $400,000 CALL ON STOCKHOLDERS. AND IF THEY HAD TOLD US THEY WANTED PAYMENT ON THE NOTE RATHER THAN EXTENDING IT, AS THEY HAD AGREED TO DO, THE NOTE COULD HAVE BEEN PAID. BUT THEY NEVER DID THAT. AND I FEEL SOMEWHAT AT A LOSS TO ARGUE AGAINST THIS TODAY, AND THOUGH IT MIGHT HAVE NO EFFECT, I WOULD REQUEST THE OPPORTUNITY TO BE ABLE TO FILE SOMETHING.

THE COURT: WHY WOULD YOU BE AT A LOSS?

MR. MCEVILY: WELL, YOUR HONOR, AT THE LAST CALL OF THE CASE, THE BANK WAS ALLOWED THE OPPORTUNITY TO SUBMIT A SUMMARY JUDGMENT MOTION. I WAS UNDER THE IMPRESSION THAT THAT WAS FOR THE COURT'S CONSIDERATION AS TO WHETHER OR NOT ONE WOULD BE FILED OR IF IT WOULD CHANGE THE

COURT'S MIND ABOUT SEVERING THIS CASE AND REMANDING OUR CASE AGAINST THE BANK BACK TO THE STATE COURT. AND WE WERE SPECIFICALLY DIRECTED NOT TO RESPOND TO THAT SUMMARY JUDGMENT MOTION AND WE DID NOT, NOR DID THE FDIC.

THE COURT: THE FDIC HAS NO POSITION EXCEPT –

MR. MCEVILY: ON THEIR INDEMNITY CLAIM.

[p. 9] THE COURT: THEY HAVE ADMITTED THEY INDEMNIFIED THE PEOPLE, THE CASE SHOULDN'T BE HERE, SO THEY DON'T HAVE ANYTHING TO SAY. I DON'T WANT TO HEAR FROM THEM. WHAT WOULD THEY HAVE TO SAY, THEY DON'T KNOW ANYTHING, AND ADMITTED THEIR INDEMNITY BY BEING HERE.

MR. MCEVILY: YES, SIR, BUT THEY WOULD LIKE TO STAY IN FEDERAL COURT.

THE COURT: AND YOU DON'T WANT TO STAY HERE?

MR. MCEVILY: THAT'S CORRECT.

THE COURT: SO, YOU ARE TELLING ME THIS IS THE SECOND LAWSUIT THAT YOU HAVE HAD OVER THIS DISPUTE AND YOU ARE NOT PREPARED TO DISCUSS THE MERITS?

MR. MCEVILY: I'M PREPARED, YOUR HONOR, BUT I WOULD LIKE TO HAVE THE OPPORTUNITY TO PERHAPS FILE THE ARGUMENT I'M ABLE TO COME UP WITH ON THE SPUR OF THE MOMENT.

THE COURT: AND I TOLD YOU IN MARCH NOT TO RESPOND TO IT.

MR. MCEVILY: YES, SIR.

AND WHEN WE RECEIVED THE PAPERS, WE SENT A LETTER INDICATING THAT AS A RESULT OF THAT DIRECTION WE WERE NOT RESPONDING.

THE COURT: BUT YOU HAVE HAD A MONTH TO LOOK AT THIS. WHAT DO YOU WANT TO TELL ME THAT YOU DON'T KNOW?

MR. MCEVILY: WELL, I WOULD LIKE –

THE COURT: THESE ARE ALL THE SAME ISSUES THAT WERE [p. 10] RAISED BEFORE, YOU SAID THEY'VE ALREADY FILED A BRIEF IN THE COURT OF APPEALS.

MR. MCEVILY: WE HAVE, YOUR HONOR. WE ARE WAITING FOR THEIRS.

THE COURT: IT'S YOUR PREPARATION WE ARE WORRIED ABOUT NOW. WHAT IS THE DIFFERENCE BETWEEN YOUR BRIEF AND THE COURT OF APPEALS.

MR. MCEVILY: THERE IS NONE. AND IT'S BASED ON THAT WRITTEN DOCUMENT, THE SUBORDINATION AGREEMENT.

THE COURT: THAT'S WHY I DIDN'T WANT A WHOLE LOT OF PAPERWORK, AS THIS IS A VERY SIMPLE CASE.

THE SUBORDINATION AGREEMENT IS WHAT IT PURPORTS TO BE, AND IT IS NOT WHAT IT IS ATTEMPTED TO BE MADE INTO. AND THAT IS THE ONLY CLAIM THAT COULD HAVE SURVIVED IF THE DOCUMENT HAD SAID SOMETHING OTHER THAN WHAT IT SAID. I SEE NO POINT IN PROLONGING THE MISERY OF THIS CASE. IT IS A SHADOW OF AN EARLIER ONE THAT IF YOU WOULD LIKE TO FILE A COPY OF YOUR COURT OF APPEALS BRIEF HERE, I WILL BE HAPPY TO RECEIVE IT. I DON'T DOUBT IT'S ANY DIFFERENT FROM THE ARGUMENTS THAT WERE MADE IN MARCH AND MADE TODAY. IT'S JUST, UNFORTUNATELY, CLIENTS CAN BE UNHAPPY, THEY JUST DONE DON'T A CASE. DO YOU WANT TO FILE YOUR COURT OF APPEALS BRIEF HERE?

MR. MCEVILY: WELL, I THINK I WOULD, YOUR HONOR.

THE COURT: DO YOU HAVE ONE WITH YOU?

MR. MCEVILY: UNFORTUNATELY, I DO NOT.

[p. 11] THE COURT: ALL RIGHT. WOULD YOU GET IT TO US? BECAUSE, LIKE I SAY, IT'S A SIMPLE TRANSACTION, THE PAPERWORK IS SELF-EXPLANATORY AND, UNFORTUNATELY, LIMITED, ALL OF THE TERRIBLE THINGS, ALL OF THE NOTICING THE CUSTOMERS AND THINGS WERE THINGS THEY HAD A

RIGHT TO DO IF THE NOTE WAS DUE AND THERE WAS NO NEW NOTE, UNLESS IT WAS EXTENDED.

MR. MCEVILY: THE OLD NOTE WAS EXTENDED BY THE SUBORDINATION AGREEMENT, RIGHT.

THE COURT: UNLESS THE OLD NOTE WAS EXTENDED BY THE SUBORDINATION AGREEMENT, THE OLD NOTE WAS DUE. AND IF THE OLD NOTE WAS DUE, ALL OF THE THINGS THEY DID, LIKE OFF-SET AND COLLECT FROM THE THIRD PARTIES, WAS PROPER.

MR. MCEVILY: IF THE NOTE WAS DUE.

THE COURT: IT ALL TURNS ON EXTEND CREDIT.

MR. MCEVILY: THAT'S CORRECT.

THE COURT: I'M GOING TO HOLD THAT THE EXTENT CREDIT IN THE SUBORDINATION AGREEMENT MEANS EXTEND CREDIT AND NOT EXTEND DUE DATES.

I WILL LOOK AT YOUR BRIEF IN THE COURT APPEALS AS AN INSTANT REHEARING AS SOON AS YOU CAN GET IT TO ME, BUT I THINK TRIPLE M TAKES NOTHING OF THE OFFICERS AND THE OFFICERS, THEREFORE, TAKE NOTHING OF THE FDIC. BUT IF THEY HAD OF, THEY WOULD HAVE.

THE COURT: OKAY. ANYTHING ELSE?

MR. MCEVILY: NO, SIR.

[p. 12] THE COURT: ANYTHING ELSE?

MR. HAWBAKER: NO, YOUR HONOR.

MAY WE BE EXCUSED?

THE COURT: YES, SIR. THANK YOU.

MR. MCEVILY: THANK YOU, YOUR HONOR.

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT OF THE PROCEEDINGS HAD IN THE ABOVE-ENTITLED CAUSE 5-10-91.

/s/ Herman Chester
HERMAN CHESTER
OFFICIAL COURT REPORTER

APPENDIX B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

TRIPLE M DRILLING CO., *et al.*,	§	
	§	
Plaintiffs,	§	CIVIL ACTION
	§	H-90-3823
versus	§	
KATHRYN SEIDER, *et al.*,	§	
	§	
Defendants.	§	

OPINION ON DENIAL OF REHEARING
(Filed May 14, 1991)

As a matter of law, a subordination agreement between MBank, Triple M, and the Oilwell Division of U.S. Steel in consideration for the extension of credit is not an agreement to extend an existing parallel debt.

Signed on May 13, 1991, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States
District Judge

Supreme Court, U.S.
FILED
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(3)

No. 91-1856

In the Supreme Court of the United States

OCTOBER TERM, 1992

TRIPLE M DRILLING COMPANY AND GARY MORRISON,
PETITIONERS

v.

KATHRYN SEIDER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the doctrine of claim preclusion bars petitioners' claims.

2. Whether the lower courts erred in interpreting Texas contract law.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is unreported, but the judgment is noted at 956 F.2d 265 (Table).

JURISDICTION

The judgment of the court of appeals was entered on February 18, 1992. The petition for a writ of certiorari was filed on May 15, 1992. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1985, petitioner Triple M Drilling Company (Triple M) obtained a revolving credit line (Note)

from MBank Houston, N.A. (MBank), where Triple M maintained various operating accounts. Pursuant to a security agreement, Triple M pledged certain accounts receivable to secure the Note and agreed that any Triple M deposit account at MBank could be set off against Triple M's indebtedness. Triple M purchased drilling equipment from United States Steel's Oilwell Division (Oilwell), financing these purchases in part by granting Oilwell a lien on Triple M's accounts receivable.

On March 3, 1987, the Note matured by its own terms. On March 25, 1987, Triple M and Oilwell executed a Subordination Agreement under which Oilwell's security interest in Triple M's accounts receivable was subordinated to MBank's security interest in those receivables. The Subordination Agreement's preamble reflects that it was designed "to induce [MBank] to extend or continue to extend credit [to Triple M] from time to time, and/or make or continue to make loans, advances, payments or other financial accommodations." Pet. 8. Nothing in the Subordination Agreement provides for extension of the Note or a new maturity date. To the contrary, the Subordination Agreement expressly reserves to MBank all of its rights against Triple M. Pet. App. 7a.

Subsequently, on May 15, 1987, nearly ten weeks after the Note matured, MBank exercised its right under the Note to offset the Triple M deposit account against Triple M's indebtedness; in addition, MBank notified Triple M's debtors to make payments directly to MBank, which was also a right expressly reserved to it under the terms of the Note. Pet. 4-5.

2. The present action is the second of two suits brought by Triple M based on the same agreements and events. In the first suit, Triple M and its officers

brought breach of contract, breach of a duty of good faith and fair dealing, and fraud claims against the Federal Deposit Insurance Corporation as Receiver for MBank Houston, N.A. (FDIC as Receiver). The district court determined that those claims were barred by 12 U.S.C. 1823(e)[1] and the doctrine of *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942). See *Triple M Drilling Co.* v. *FDIC*, No. H-89-1511 (S.D. Tex. Aug. 9, 1990), aff'd, 949 F.2d 1158 (5th Cir. 1991) (Table), cert. denied, 112 S. Ct. 1938 (1992) (*Triple M I*).[2]

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[1] 12 U.S.C. 1823(e) (Supp. I 1989) provides:

> No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement:
>
> (1) is in writing,
>
> (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (4) has been, continuously, from the time of its execution, an official record of the depository institution.

[2] The *Triple M I* district court disposed of several other claims on different grounds. The court ruled that Triple M's officers lacked standing to bring Triple M's claims for commercial disparagement, fraud, breach of good faith, and tortious interference. The court also dismissed the officers' claims for defamation and intentional infliction of emotional distress because they were unsupported by either the allegations or the summary judgment evidence. Finally, the district

3. The allegations in the present action parallel those made in *Triple M I*. Petitioners claim that MBank's officers were guilty of breach of contract, breach of a duty of good faith and fair dealing, and fraud. The only distinction between the present case and *Triple M I* is that the defendants here are MBank's officers, who then filed a third-party petition against the FDIC as Receiver seeking indemnity or contribution for any damages awarded against them. The district court granted summary judgment to the officers and the FDIC, holding that the language in the preamble to the Subordination Agreement did not effect an extension of the due date of the Note. Pet. App. 3. The district court based its ruling solely on interpretation of the Subordination Agreement and did not apply either the *D'Oench* doctrine or 12 U.S.C. 1823(e). Pet. App. 5a-6a.

4. The court of appeals affirmed. Pet. App. 1a-8a. The court found that all but one of petitioners' claims against MBank's officers were barred by claim preclusion because they had previously been brought against the FDIC as Receiver in *Triple M I*. Because the actions complained of fell within the scope of the officers' employment with MBank, the court found identity of parties for purposes of claim preclusion. Pet. App. 5a-6a. The court of appeals did not address the applicability of *D'Oench* or Section 1823(e).

The court determined that petitioners' claim for tortious interference with contract was not barred by claim preclusion, but rejected that claim on the

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court dismissed Triple M's claim for tortious interference with contract, finding that MBank had a bona fide right under the Note to offset the Triple M account and notify Triple M's customers to send payments directly to the bank.

merits. That claim was premised on petitioners' contention that the preamble language in the Subordination Agreement extended the Note's due date. The court of appeals found, however, that under Texas contract law the Subordination Agreement could not be given that reading as a matter of law. Because nothing in the preamble language or any other part of the Subordination Agreement identified the Note, provided for its extension, or referenced a new maturity date, that agreement could not be deemed "an agreement to extend the revolving note." Pet. App. 5a-7a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is accordingly unwarranted.

1. Petitioners contend that the courts below misapplied the *D'Oench* doctrine and Section 1823(e) in ruling that the Subordination Agreement's preamble did not extend the Note's due date. Pet. 3, 7. To the contrary, the lower courts did not even rely on the *D'Oench* doctrine or Section 1823(e). Rather, they concluded that petitioners' claims (with one exception) had already been litigated and were therefore barred by claim preclusion.[3] The *Triple M I* court concluded that Triple M's claims against the FDIC (as receiver for MBank) for breach of contract,

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[3] Claim preclusion prevents parties to a prior proceeding, or those in privity with them, from relitigating claims that were subject to a final judgment on the merits by a court of competent jurisdiction. *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980); *Lubrizol Corp.* v. *Exxon Corp.*, 871 F.2d 1279, 1287 (5th Cir. 1989).

breach of good faith and fair dealing, and fraud were barred by *D'Oench* and Section 1823(e).[4] This Court recently denied certiorari in that case. *Triple M Drilling Co.* v. *FDIC*, No. H-89-1511 (S.D. Tex. Aug. 9, 1990), aff'd, 949 F.2d 1158 (5th Cir. 1991) (Table), cert. denied, 112 S. Ct. 1938 (1992). In the instant case, the court of appeals properly concluded that virtually all of petitioners' claims were merely an attempt to relitigate claims they had unsuccessfully pressed in *Triple M I*. Because petitioners have not challenged the court of appeals' finding that claim preclusion applies,[5] but instead seek this

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[4] In *Triple M I*, petitioners argued unsuccessfully that inferences of an agreement to extend the Note's maturity date could be drawn from the Subordination Agreement and other extrinsic evidence. That argument failed because a claimed inference of an agreement drawn from bank documents cannot withstand either the *D'Oench* doctrine or Section 1823(e). *Clay* v. *FDIC*, 934 F.2d 69, 73 (5th Cir. 1991); *Bowen* v. *FDIC*, 915 F.2d 1013, 1016-1017 (5th Cir. 1990) (the FDIC need not search a failed bank's documents for inferences and hidden duties).

[5] It is clear, in any event, that the court of appeals was correct in concluding that claim preclusion was applicable in this case. The only conceivable difference between the present case and *Triple M I* is the identity of the defendants. The court of appeals correctly concluded, however, that identity of parties existed, based on privity, because the actions complained of were performed within the scope of the officers' duties as MBank employees. Pet. App. 5a-6a. See *Lubrizol*, 871 F.2d at 1288 ("employer-employee or principal-agent relationships may ground a claim preclusion defense, regardless which party to the relationship was first sued"). In addition, claims arising from actions by a failed depository institution and its agents are enforceable only against the receiver. See *Gaff* v. *FDIC*, 919 F.2d 384, 394 (6th Cir. 1990); *Pernie Bailey Drilling Co.* v. *FDIC*, 905 F.2d 78, 80 (5th Cir. 1990); *Beighley* v. *FDIC*, 868 F.2d 776, 779-780 n.7 (5th Cir.

Court's review on the same issues that were raised in *Triple M I*, there is no basis for further review by this Court.

2. Rather than finding Triple M's claim for tortious interference with contract to be barred by claim preclusion, the court of appeals rejected that claim on the merits as a matter of Texas state law. In light of this Court's "settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law," *Bowen* v. *Massachusetts*, 487 U.S. 879, 908 (1988), the court of appeals' resolution of the tortious interference with contract claim does not warrant this Court's review. See also *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383, 395 (1988).

In any event, the court of appeals was correct. In short, the court rejected petitioners' contention that the Subordination Agreement extended the due date of the Note because the agreement lacked any language to that effect. Nothing in the preamble or any other part of the Subordination Agreement identified the Note, provided for its extension, or referenced a new maturity date. Even assuming that Triple M and MBank meant to extend the Note, under Texas law the failure to include those essential terms rendered the agreement unenforceable as a matter of law. *Bank of El Paso* v. *T.O. Stanley Boot Co.*, 809 S.W.2d 279 (Tex. Ct. App. 1991), writ granted (Tex. 1992); *University National Bank* v. *Ernst & Whinney*, 773 S.W.2d 707 (Tex. Ct. App. 1989).[6] Finally, the court

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1989). Since the receiver is the only appropriate defendant for all of petitioners' claims, identity of parties exists for purposes of claim preclusion.

[6] Moreover, even if petitioners were correct that the Subordination Agreement was ambiguous and its interpretation

noted that Triple M conceded in its pleadings that MBank had expressly refused to sign an extension of the Note during negotiation of the Subordination Agreement. Pet. App. 7a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1992

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was a matter for the jury, the agreement would necessarily be unenforceable against the FDIC as receiver for MBank under the doctrine of *D'Oench* and Section 1823(e).

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